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IN THE

Supreme Court of the United States

October Term, 1955

No. 574

WILLIAM E. WARD,
Petitioner

vs.

CHARLES S. THOMAS, Secretary of the Department of the Navy,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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William E. Ward, petitioner herein, respectfully prays that a Writ of Certiorari be issued by this Honorable Court to review the Judgment of the United States Court of Appeals for the District of Columbia Circuit, entered on August 18, 1955, (Appendix, p. 15), reversing the Judgment of the United States District Court for the District of Columbia, and the Order entered on September 23, 1955, (Appendix, p. 23), denying Petition for Rehearing In Banc.

The Judgment of the United States District Court, which was reversed, directed the restoration to classified civil service of William E. Ward, who was summarily removed from his government position because of "unsatisfactory service".

In a previous case, entitled Ward v. Anderson, (Anderson having preceded Thomas as Secretary of the Navy),

93 U.S. App. D.C. 156, 208 F (2nd) 48, the United States Court of Appeals for the District of Columbia Circuit reversed the lower Court, remanding the case for a further report from the administrative agency as to the applicability of the removal provision of the Act of September 30, 1950, referred to as the Performance Rating Act of 1950, 5 U.S.C. § 2005.

The Judgment on the Mandate in the previous case of Ward v. Anderson, was entered on April 30, 1954 (Appendix, p. 24), and the Order of the United States District Court restoring Ward to classified civil service was entered on July 12, 1954, (Appendix, p. 25) after the filing of a report by the administrative agency as to the applicability of the provisions of 5 U.S.C. § 2005, pursuant to said Judgment on Mandate.

The appellant in the present case thereupon took an appeal from the Order restoring petitioner to the classified civil service, as aforesaid.

STATUTORY PROVISION AS TO JURISDICTION

The case is within the jurisdiction of this Court under Title 28, Section 1254 of the U.S.C., the United States Court of Appeals for the District of Columbia Circuit, being the Court of highest jurisdiction in the District of Columbia.

GROUNDS ON WHICH JURISDICTION IS INVOKED

This Court has jurisdiction to review the Judgment herein by Writ of Certiorari, for the following special and important reasons:

1. The United States Court of Appeals for the District of Columbia Circuit has decided an import-

ant question of federal law which has not been, but which should be, settled by this Court.

2. The United States Court of Appeals for the District of Columbia Circuit has decided a federal question of substance not heretofore determined by this Court.

3. The case is of grave and vital importance to approximately 2,500,000 officers and employees of the federal government in the classified service.

QUESTIONS PRESENTED FOR REVIEW

The questions presented for review are as follows:

1. Whether a federal employee in the classified civil service may be removed from his position for "unsatisfactory service" (in the face of a work performance rating of "satisfactory"), prior to being given a 90 day warning as prescribed in Section 6 of the Act of September 30, 1950, 5 U.S.C. § 2005.

2. Whether the provisions in Section 6 of the Act of September 30, 1950, 5 U.S.C. § 2005, with respect to the removal from classified civil service of a federal employee for "unsatisfactory service", may be totally disregarded in cases where removal is sought because of "unsatisfactory service".

3. Whether a federal employee in the classified civil service may be removed from his position for "unsatisfactory service" in the face of a performance rating of "satisfactory".

STATUTES INVOLVED

Section 6 of the Act of September 30, 1950, referred to as the Performance Rating Act of 1950, 5 U.S.C. § 2005, provides as follows:

"Each performance-rating plan shall provide for rating representing at least (1) satisfactory performance, corresponding to an efficiency rating of 'good' under the Veterans' Preference Act of 1944, as amended, and under laws superseded by this chapter; (2) *unsatisfactory performance which shall serve as a basis for removal* from the position in which such unsatisfactory performance was rendered; and (3) outstanding performance which shall be accorded only when all aspects of performance not only exceed normal requirements but are outstanding and deserve special commendation. *No officer or employee shall be rated unsatisfactory without a ninety-day prior warning* and a reasonable opportunity to demonstrate satisfactory performance." (Italics inserted)

Section 14 of said Act of September 30, 1950, provides as follows:

"All laws or parts of laws inconsistent herewith are hereby repealed to the extent of such inconsistency."

STATEMENT OF CASE

The petitioner was summarily removed from office on May 7, 1951, on the ground of "unsatisfactory service", without any previous warning or intimation that his removal was sought because of "unsatisfactory service". It is apparent from the record that his summary removal resulted from the personal antagonism of his superior officer, and that petitioner was relieved of his duties through a "swifty removal" in total disregard of the removal provision of the Performance Rating Act of 1950, 5 U.S.C. § 2005, rather than in compliance with the law.

At the time of his removal he held the position of Personnel Officer at the Marine Corps Air Station, Cherry Point, North Carolina, serving as Employment Officer and as Recorder of the Board of Civil Service Examiners, and charged with the duty of employing civilian personnel in accordance with the Civil Service laws and regulations.

He came to Cherry Point Station on April 24, 1942, by transfer and promotion, from the Office of the Labor Board, Naval Gun Factory, at Washington, D. C., at which time the Cherry Point Station had not yet been "commissioned" or accepted by the government from the contractors, and its operation had not begun. He organized the Employment Office, of which he was the head, and the employment of all civilian personnel at Cherry Point was under his jurisdiction.

His services prior to May 7, 1951, had always been considered as *"satisfactory"* and beyond reproach. There had been neither criticism nor complaint in regard thereto. In fact, his "performance rating", under the provisions of the Act of September 30, 1950, as of March, 1951 (and which actually was delivered to him in April, 1951), was given as "satisfactory".

However, on May 7, 1951, as above stated, without previous warning or any intimation whatsoever, petitioner was *summarily relieved of duty, and put out of his office.* On May 11, 1951, he was formally advised by letter that his employment had been terminated on the ground of *"unsatisfactory service"*.

The details on which the general charge of "unsatisfactory service" was based in the letter of May 11, 1951, were general in their nature and failed to meet the particularity required by the Navy Civilian Personnel Instructions 45, 2-3c(2) and 45.5-3Bc.

They did, however, inform petitioner that his services were being terminated on the ground of *"unsatisfactory service"*. On May 31, 1951, an attempt was made to amplify the items evidencing "unsatisfactory service". In this letter, too, petitioner was advised, "your removal from employment was proposed because of *"unsatisfactory service"*.

And finally, the petitioner received a formal "Notification of Personnel Action" (Appendix, p. 27), wherein he was notified that the "Reason for Removal" from office was on account of *"unsatisfactory service"*, although three lines below, in definite contradiction thereof, his performance rating was given as "satisfactory".

No other ground, whatsoever, was at any time given petitioner for the "Reason for Removal".

In other words, he was not removed because of disloyalty, or as a security risk, or for corruption, or for other misconduct or for any reason other than for *"unsatisfactory service"*.

Nor was his summary removal an "unusual" case, nor an "emergency" case, as defined in the Navy Civilian Personnel Instructions (N.C.P.I.), in effect at the time, sections f(1) and f(2) providing as follows:

> "(1) In *unusual* cases where the retention of the employee in an active duty status in his position during the notice period may result in damage to government property, would be otherwise detrimental to the interest of the government or would be injurious to the employee, his fellow workers, or the general public, the employee may be taken off his job. In such cases, if the employee cannot during such period be temporarily assigned to duties in which these conditions would not exist, he shall be placed on annual or sick leave as appropriate, if available, and otherwise on leave without pay if the employee so consents, for such time during the notice period as the circumstances warrant. The reasonableness of such exceptions in the cases of veterans will be considered where such employees appeal from final adverse decisions.
>
> (2) In *emergency* cases requiring suspension (not to exceed 30 days) during the notice period, the provisions of N.C.P.I. 45.2-8a will be followed." (Italics inserted)

The fact that petitioner was *summarily removed,* in an *arbitrary* and apparently malicious manner, is thus emphasized.

Congress intended, through the enactment of the removal provision in the Act of September 30, 1950, that government employees should be protected against "arbitrary, capricious or unjust discharge" where their work performance was involved. Such protection was urged by representatives of the American Federation of Government Employees, the National Federation of Government Employees, Government Employees' Council, and the American Federation of Labor, at the hearings that resulted in the enactment of the removal provision in the Performance Rating Act of 1950.

In the Opinion below (Appendix, p. 15), an erroneous statement is made that petitioner "was removed from his office pursuant to charges brought against him under the provisions of the Lloyd-LaFollette Act". It then refers to various "charges" which are in fact, factors upon which an employee's work performance is based,—that is whether "satisfactory" or "unsatisfactory". As above stated, petitioner was removed because of "unsatisfactory service" or "unsatisfactory work performance", and for no other reason, and he was not informed that he was removed under the provisions of the Lloyd-LaFollette Act or any other Act. His removal unquestionably was illegal and in contravention of the law.

REASONS FOR GRANTING THE WRIT

The issues presented by this case raise questions of fundamental importance to the Government of the United States and approximately 2,500,000 federal employees.

The decision below deprives federal employees of procedural safeguards in the matter of removal from office,

which were intended through the enactment of the Act of September 30, 1950.

The issues which this Honorable Court is asked to decide, for the first time, are based on certain provisions contained in the Act of September 30, 1950, whereunder Congress sought to safeguard the removal of federal employees for "unsatisfactory services".

In the case of Ward v. Anderson, 93 U.S. App. D.C. 156, 208 F. (2nd) 48, the Court stated:

> *"The issue raised for the first time* in the District Court *involved a substantial question of law*—construction of a statute which appears to require disciplining officials to follow certain specific procedural directions." (Italics inserted)

As recently as July 19, 1954, the Subcommittee on the Federal Civil Service of the Committee on Post Office and Civil Service of the House of Representatives, submitted a report (House Report No. 2277, 83rd Congress, 2nd Session), wherein it emphasized the importance of protecting the procedural safeguards in the matter of removal from office of federal employees where "job performance is primarily concerned".

In this report, on pages 10 and 11, it is stated:

> "While the subcommittee recognizes that there are a number of improper actions which still can be covered by the Lloyd-LaFollette Act, it feels that where *job performance* is primarily concerned, the provisions of the Performance Rating Act of 1950 should prevail. (Italics inserted)
>
> This feeling recently has been substantiated by a United States Court of Appeals decision in the case of Ward v. Anderson (208 F 2d 48). Ward, a Department of the Navy employee, had just received a 'satisfactory' performance rating a short time prior to being given a letter of charges and discharged because his work was deficient in certain respects.

The United States Court of Appeals, in remanding this case to the district court, indicated that where work performance was concerned, it appeared that the provisions of the Performance Rating Act of 1950, and not the Lloyd-LaFollette Act of 1912, should apply.

The subcommittee is firmly convinced that this safeguard provision in section 6 of the Performance Rating Act of 1950 is highly desirable and should be retained. . . ."

"To those departments and agencies desiring to discharge substandard employees, the subcommittee reminds them that they should scrutinize performance meticulously during probationary periods, because this is the time when poorly qualified workers can be easily separated and properly should be. Once employees complete their probation and acquire civil-service status, they also rightfully acquire certain appeal rights from adverse personnel actions including separations for unsatisfactory performance. Such rights are predicated on the theory that they have proven their ability by having successfully completed their trial period in Government and accordingly, the burden to prove to the contrary rests now on the agency, whereas during probation it was on the employee.

It is not the desire of the subcommittee that this section of its report be misconstrued by the departments and agencies. The subcommittee is not condemning the use of the provisions of either the Lloyd-LaFollette Act or section 14 of the Veterans' Preference Act to discharge undesirable workers. Furthermore, it recognizes the necessity for just such an administrative authority as these acts provide. What the subcommittee is interested in, rather, is making certain that career employees are given every consideration to which they are rightfully entitled.

Where they are not performing up to standard, the subcommittee wants them to be so informed, along with suggestions and assistance on how to elevate the quality of their work to where it will meet the

job requirements. THE PROVISIONS OF SECTION 6 OF THE PERFORMANCE RATING ACT OF 1950 REQUIRE THAT THIS BE DONE, AND ALSO PROVIDE FOR A 90-DAY WARNING NOTICE. IT IS THIS SAFEGUARD THAT THE SUBCOMMITTEE DOES NOT WANT TO SEE SUBVERTED BY ADMINISTRATIVE MISUSE OF OTHER STATUTES." (Capital letters inserted)

The report further sets out on page 17:

"The subcommittee believes that the present safeguard provisions of section 6 of the Performance Rating Act of 1950 relating to the 'unsatisfactory' rating, namely, that employees be given a 90-day advance warning and a reasonable time in which to demonstrate improved performance, before the adverse 'unsatisfactory rating is given him, are protective rights which career employees are justly entitled. FURTHERMORE, AGENCIES SHOULD NOT SUBVERT THESE RIGHTS WHICH CONGRESS HAS GRANTED TO FEDERAL CAREER WORKERS THROUGH THE MISUSE OF OTHER LAWS OR ADMINISTRATIVE REGULATIONS GOVERNING PERSONNEL." (Capital letters inserted)

In the administrative report by the Department of the Navy, submitted pursuant to the court mandate in Ward v. Anderson (93 U.S. App. D.C. 156, 208 F. 2nd 48), the Department of the Navy, for the first time, referred to the Act of August 24, 1912, the Lloyd-LaFollette Act (5 U.S.C. 652), as the Act applicable in the removal of petitioner, and erroneously read into the Act of September 30, 1950, an interpretation which nowheres appears in the latter Act. The administrative agency, in its report, *erroneously* and *improperly* made the following observation:

"The Performance Rating Act of 1950, section 6 (5 U.S.C. 2005) was not the appropriate law to invoke, nor is it applicable, because this Act was intended to be applied to an employee whom the department be-

lieves will improve his work performance or whose experience and services can be utilized by reassignment to another position. In other words, the Performance Rating Act should be applied when the agency or department contemplates continued employment of the individual rather than his immediate removal as soon as the procedures of the applicable removal laws (5 U.S.C. 652, id. 863) shall have been complied with."

If this interpretation were the intention of Congress, Congress would have so provided in the law. But it did not so provide.

There is nothing in the Act of September 30, 1950, suggesting that the removal provision therein applies *only* "when the agency or department contemplates continued employment of the individual rather than his immediate removal."

In fact, this contention is specifically refuted by the removal provision for unsatisfactory work performance under the "Performance Rating Plan" ordered by the Department of the Navy, itself, on December 7, 1950, N.C.P.I. 130, Section 5-1(b), shortly after the enactment of the Act of September 30, 1950, which provided:

> "*A warning should be given at any time prior to ninety days before the close of a rating period.* A warning given within ninety days preceding the close of the rating period serves to extend the rating period by the length of the unexpired portion of the warning period. On the other hand, whenever sustained unsatisfactory performance is clearly indicated at any time during the rating period, *corrective action should be taken administratively toward improving performance.* If sustained performance remains unsatisfactory, notwithstanding corrective actions taken and assistance given the employee, the employee should be demoted or separated on the basis of charges as outlined in Section 7 of this Instruction without regard to either rating or warning periods."

> Section 7-4 of the plan provided: "The single requirement of a penalty nature called for in the Performance Rating Act of 1950 is *'removal from the position in which unsatisfactory performance was rendered'*. An employee who, after a full and fair trial, demonstrates a sustained performance that is clearly unsatisfactory, should be promptly reassigned, demoted or separated from employment, without regard to whether or not a performance rating has been made." (Italics inserted)

Attention again is respectfully invited to the fact that in the case of the petitioner, there was no demonstration of "sustained performance that is clearly unsatisfactory", as he had received his work performance rating as "satisfactory", shortly before he was notified of his summary removal because of "unsatisfactory service", and, that this formal removal notification (Appendix, p. 27), referred to his work performance as "satisfactory", as aforesaid. A review of the record will emphasize the fact that William E. Ward, the petitioner, was removed from office on the broad charge of "unsatisfactory work performance"; that this charge was considered equivalent to a charge of "unsatisfactory services", and that no attempt was made by the administrative agency to differentiate in such interpretation until the present litigation was instituted.

The question as to the applicability of Section 6 of the Performance Rating Act of 1950, where a federal employee's removal was sought ostensibly because of his *alleged unsatisfactory work performance*, has never been decided, but should be determined, by this Honorable Court. It would appear that the Government should join in seeking a final determination of this important federal question by this Court.

The removal provision contained in this Act is the more recent enactment, and therefore the procedure therein provided should prevail.

Although the Performance Rating Act of 1950, did not specifically state that the safeguard provisions contained in Section 6 of this Act repealed or amended that part of the Lloyd-LaFollette Act of 1912, as may pertain to removal of federal employees for unsatisfactory services, Section 14 of the Act of September 30, 1950, provides as follows:

> "All laws or parts of laws inconsistent herewith are hereby repealed to the extent of such inconsistency."

But, irrespective of Section 14 of this Act, this Honorable Court frequently has pointed out that where two legislative acts are repugnant to, or in conflict with each other, the one *last passed*, being the latest expression of the legislature, *"will, although it contains no repealing clause, govern, control, or prevail*, so as to supercede or impliedly repeal the act", or any repugnant portion thereof. Henrietta Mining Co., etc. v. Gardner, 173 U.S. 123; U.S. v. Tynen, 11 Wall. 88.

In a separate opinion, in concurring with the Judgment below of the United States Court of Appeals, Circuit Judge Bazelon stated:

> "Since the Performance Rating Act is the more recent law, and affords additional protection to federal employees, I would be unwilling to infer that Congress intended such a result without express language to that effect."

However, upon considering the Petition for Rehearing In Banc, Judge Bazelon acted affirmatively thereon, in the divided action of the Court.

In conclusion, it is respectfully submitted that the Court below has decided a most important federal question of federal law which has not been, but should be, specifically settled by this Court; that the question involved is of vital importance to both the Government and

over several million federal employees, and should be decided by the court of last resort.

FOR THE FOREGOING REASONS, THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE GRANTED.

Respectfully submitted,

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